No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G. G. BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM
Plaintiff-Appellant,

v.

GLOUCESTER COUNT Y SCHOOL BOARD,
Defendant-Appellee;

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, ARIZONA, KANSAS, NEBRASKA, TEXAS, AND UTAH AND THE GOVERNORS OF THE STATES OF MAINE AND NORTH CAROLINA SUPPORTING DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Regulation

Rule

Other Authorities

IDENTITY OF *AMICI*[1]

The States of West Virginia, Arizona, Kansas, Nebraska, Texas, and Utah and the Governors of the States of Maine and North Carolina support en banc review. These States share an interest in maintaining control of their schools and ensuring that the United States Department of Education not interfere with these schools by manufacturing ambiguity in the plain text of Title IX or its long-standing regulations.

SUMMARY OF ARGUMENT

This Court should rehear this case en banc because the panel majority's opinion is the first in the country to permit the United States Department of Education to interfere with local schools by unilaterally redefining the statutory term "sex"—long and widely accepted to be a biological category—to include gender identity. No court has ever before accepted an interpretation of that term that would require, as here, that a biological girl is entitled to use the boys' restroom, and vice versa.

I. The federal laws at issue prohibit disparate treatment "on the basis of sex," 20 U.S.C. § 1681(a); 34 C.F.R. § 106.33, a term long understood to be a biological category, and not one that includes self-proclaimed gender identity. The

[1] *Amici* States file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure, which provides that "[a] state may file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a). No party or party's counsel funded or authored this brief in whole or in part. *Id*. 29(c)(5).

dictionaries at the time of Title IX's passage defined the term "sex" as a biological category based principally on male or female reproductive anatomy. And every other court to consider this question has held that "sex" means biological sex, not gender identity.

II. Even if the term "sex" were ambiguous, the clear-notice requirement of the Spending Clause would prohibit reading the term to include gender identity. It is well-settled that when Congress attaches conditions to federal funding under the Spending Clause, as it did with Title IX, it must give clear notice of the restrictions. There is no plausible argument that States had clear notice that the term "sex" included gender identity.

III. The panel majority's deference to the Federal Government's guidance is misplaced. Deference is inappropriate where, as here, a federal agency has promulgated interpretive guidance that squarely conflicts with an unambiguous statutory and regulatory term.

ARGUMENT

I. The Statute And Regulation Apply Only To Sex As A Biological Category, Not To Gender Identity.

On their face, both the statute and regulation at issue forbid disparate treatment of the biological sexes in any education program or activity receiving federal funding, not disparate treatment based on an individual's proclaimed gender identity. The key statutory phrase at issue in Title IX is "on the basis of

sex." 20 U.S.C. § 1681(a). The operative term "sex" was defined consistently in dictionaries at the time of Title IX's passage as a biological category based principally on male or female reproductive anatomy.[2] *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (A regulation's meaning "at the time of [its] promulgation" controls) (quotations omitted). The transitive verb "to sex" thus meant "'to determine the sex of, *by anatomical examination*.'" States' Amici Curiae Br., *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir.) (citing 9 Oxford English Dictionary at 578 (emphasis added)). The statute does not refer to gender or gender identity. Nor does 34 C.F.R. § 106.33, which expressly authorizes separate restrooms and locker rooms "on the basis of sex." Even the panel opinion was forced to admit that "the language itself—'of one sex' and 'of the other sex'—refers to male and female students." *G.G. ex rel. Grimm*, 2016 WL 1567467, at *5 (4th Cir. Apr. 19, 2016).

Applying this accepted, biological understanding of "sex," other courts to consider Title IX have held that schools may provide separate bathrooms on the basis of biological differences. *E.g.*, *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th

[2] *See* States' Amici Curiae Br., *G.G. ex rel. Grimm*, No. 15-2056 (4th Cir.) (citing, *e.g.*, 9 Oxford English Dictionary 578 (1961) (defining "sex" as the "sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."); Webster's New International Dictionary of the English Language (2d ed. unabridged 1939) (defining "sex" in terms of "the distinctive function of the male or female in reproduction"; "Sex refers to physiological distinctions; gender, to distinctions in grammar")).

Cir. 1994); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 672–77 (W.D. Pa. 2015); *Doe v. Clark Cnty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872 at * 4 (D. Nev. Sept. 17, 2008).

Courts addressing the term "sex" in Title VII have similarly applied its accepted, biological meaning. The Eighth and Tenth Circuits have rejected Title VII sex-discrimination claims by biological males with male genitalia who sought to use women's restrooms. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220–22 (10th Cir. 2007); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). Other circuits have refused to apply Title VII to transgendered persons. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085–87 (7th Cir. 1984). As the Seventh Circuit explained, it is not for judges to broaden statutes beyond the plain, traditional definition of "sex": "[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Id.* at 1087.

II. In Any Event, Title IX Contains No Clear Notice That It Extends Beyond Sex As A Biological Category.

If there were any question about the meaning of the word "sex" under Title IX, however, it would be resolved by the clear-notice requirement of the Spending Clause. When Congress wishes to attach strings to federal funding under the Spending Clause, as it did with Title IX, it must give ample notice of the restrictions it is imposing at the time the States decide to accept the funds. *Davis,*

as Next Friend of Lashonda D. v. Monroe Cnty. Bd. of Edu., 526 U.S. 629, 640 (1999). "[W]hen Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). That is because Spending Clause legislation is like a contract, and recipients of federal funds must accept the conditions "voluntarily and knowingly." *Id.* Clear notice is particularly important here, as control of our schools is "one of the most traditional areas of state concern" and "most sensitive areas of human affairs." *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting).

The clear-notice canon reinforces that the disparate treatment prohibitions of Title IX are limited to sex as a biological category. That was not only the accepted, but the *sole*, understanding of the term "sex" in that context at the time of Title IX's passage. To extend its meaning to include gender identity would introduce a condition that the States could not have voluntarily or knowingly accepted at the time they first opted into the Title IX regime.

III. The Department Of Education's Guidance Letter Is A Unilateral Attempt To Re-Write Title IX And Warrants No Deference.

Disregarding both the plain meaning of the term "sex" and the clear-notice requirement of the Spending Clause, the panel allowed the Department of Education to redefine the term "sex" to include gender identity. The majority held

that the term "sex" was ambiguous. Then it deferred under *Auer v. Robbins*, 519 U.S 452 (1997), to an informal Department guidance letter opining that "sex" in the Title IX regulations includes gender identity. *G.G. ex rel. Grimm*, 2016 WL 1567467 at * 6–7.

The panel majority's deference to the Federal Government is misplaced. Interpretive guidance can at most put a gloss on a statute or regulation, not subvert it. *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 108 (1983). Where interpretive guidance changes a regulation, it is no longer interpretive or guidance, and it must go through notice and comment. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("[T]he same procedures" apply to "amend or repeal a rule" as "to issue the rule."). Furthermore, *Auer* deference applies only when a regulation is ambiguous, and even then, only when the agency's interpretation of that ambiguity does not conflict with the text of the regulation. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).[3]

Here, far from putting a gloss on an unclear regulatory term, the Federal Government has used an informal guidance letter to redefine the clear statutory and regulatory term "sex" to mean something quite different and new. The

[3] *See also G.G. ex rel. Grimm*, 2016 WL 1567467 at * 6 (recognizing that "the Department's interpretation is [not] entitled to *Auer* deference [if] the interpretation is plainly erroneous or inconsistent with the regulation or statute")

Department's new interpretation of the term "sex" flatly conflicts with the undisputed historical understanding of that term in the statute and regulation. Indeed, the Department claims that gender identity trumps sex, so that a biological girl is entitled to use the boys' restroom, and vice versa. That is not a gloss on the term "sex," but a wholesale displacement of it. Dist. Ct. Op. 12–15. What is more, even if the term "sex" were ambiguous, *G.G. ex rel. Grimm*, 2016 WL 1567467 at * 6–7, the Department's dramatic change in interpretation would require a formal notice-and-comment process, and in any event, would be too great a departure from the historical understanding to comport with the clear-notice requirement for Spending Clause legislation.

The unprecedented nature of the panel majority's deference cannot be understated. Its opinion was the first by any court ever, anywhere in the United States, to allow the Federal Government to redefine the term "sex" to force local schools to admit adolescent biological females into boys' bathrooms and locker rooms, and adolescent biological males into girls' bathrooms and locker rooms. In this case, the panel majority has allowed the Federal Government to override the local school board's attempt at a reasonable accommodation of multiple single-stall, unisex restrooms. And it has done so without taking into account any of the competing privacy and safety concerns of other students. *G.G. ex rel. Grimm*, 2016 WL 1567467, at * 8; *see id*. at *16, 19–20 (Niemeyer, J., dissenting). These

are policy questions that should be answered by the people's elected representatives, not the courts or the federal executive.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limits of Fed. R. App. P. 29 and 40 because this brief is less than seven and one-half pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2016, the foregoing document was served on the counsel of record for all parties through the CM/ECF system. A paper copy of this brief will be sent to the Clerk of Court via Federal Express.

/s/ Elbert Lin	May 10, 2016
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